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No. 95-1929

In the
# Supreme Court of the United States
OCTOBER TERM, 1995

MARY McCABE, AS ADMINISTRATRIX
OF THE ESTATE OF RUCHLA "ROSE" ZINGER,
*Petitioner,*

*v.*

THE CITY OF LYNN,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## STATEMENT OF THE CASE.

### A. *Limit of Petitioner's Claim Below*

This is a civil rights action under 42 U.S.C. § 1983 brought in the United States District Court for the District of Massachusetts by the Petitioner, Mary McCabe ("McCabe") (the plaintiff below), as administratrix of the Estate of Ruchla "Rose" Zinger, against the Respondent, City of Lynn, Massachusetts ("City"). (A. A at 5a).[1]

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[1] References herein to the opinion of the United States Court of Appeals for the First Circuit are "A. A" and to the decision of the United States District Court for the District of Massachusetts are "A. B", respectively, of the petition Appendix.

McCabe claimed that the City Police Department maintained a policy violative of the Fourth Amendment in permitting police officers to forcibly enter residences without a judicial warrant, and in the absence of exigent circumstances, in execution of so-called "pink papers," orders issued by a psychiatrist pursuant to Massachusetts General Laws, c. 123, § 12(a) for the involuntary temporary hospitalization of dangerous mentally ill persons. (A. A at 5a-6a). McCabe claimed that this policy caused a violation of Ms. Zinger's "Fourth Amendment right to be free from unreasonable searches" when, on September 7, 1989, Lynn police officers forcibly entered Ms. Zinger's apartment without a warrant in execution of a § 12(a) pink paper for the emergency temporary hospitalization of Ms. Zinger as a dangerous mentally ill person. (A. A at 6a).[2]

The district court granted summary judgment for McCabe. Upon the City's appeal the United States Court of Appeals for the First Circuit reversed and remanded holding that the City was entitled to summary judgment as the challenged policy comports with the "special needs" exception to the Fourth Amendment warrant requirement. (A. A at 32a).

### B. *Relevant Statutory Provisions*

Chapter 123 of Massachusetts General Laws provides a comprehensive scheme for administering to mentally ill persons.

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[2] It is to be noted, as did the First Circuit:

> The only constitutional violation McCabe attributes to the City is the forcible warrantless entry.

(A. A at 5a, n.2).

> We point out again, however, that McCabe presently challenges only the alleged infringement of Ms. Zinger's Fourth Amendment right to be free from unreasonable governmental entries to her residence, *see supra* note 2, and does not allege an infringement of her liberty interest to be free from any unreasonable governmental restraint attending the subsequent seizure of her person.

(A. A at 6a, *see also infra* n.4).

Section 12(a) thereof makes provision for the emergency restraint and temporary involuntary hospitalization of dangerous mentally ill persons. In particular, § 12(a) includes provision for the involuntary hospitalization of recalcitrant and dangerous mentally ill persons. It provides that:

> in an "emergency situation," a qualified physician . . . may sign a pink paper, even when the alleged mentally ill person refuses to submit to a medical examination, if the "facts and circumstances" suggest that the person would create a "likelihood of serious harm".

(A. A at 16a).[3] Section 1 (second clause) of ch. 123, defines "likelihood of serious harm" as:

> a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them.

(A. A at 18a) (A. C at 60a).

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[3] First Circuit parsing § 12(a). This provision is referred to by the First Circuit as a "category 2" commitment procedure, *see* A. A at 16a-17a.

C. *Limit of Petitioner's Claim Before This Court – Matters Not Questioned.*

(1) Petitioner Does Not Question the Interpretation by the Court Below of Relevant State Statutes.

The First Circuit made four specific findings respecting the State's statutory scheme, *none of which are challenged here*:[4]

(a) The legitimacy of the State's *parens patriae* and "police power" interests in ensuring that "dangerous" mentally ill persons not harm themselves or others is beyond dispute.

(A. A at 14a).

(b) Where a pink paper issues for a recalcitrant and dangerous mentally ill person pursuant to § 12(a),

the statute implicitly authorizes warrantless searches and seizures.

(A. A at 17a).

(c) The statutory definition of "likelihood of serious harm"

prescribes a sufficiently clear and reasonably reliable administrative standard for ensuring that involuntary commitments are limited to imminently "dangerous" mentally ill persons in emergent circumstances.

(A. A at 19a).

[4]The petitioner's posture before this Court appears to be that the First Circuit was in error in finding that warrantless entry in the service of a "category 2" pink paper [emergency temporary commitment of a recalcitrant and dangerous mentally ill person] is within the "special needs" exception to the warrant requirement, not that the First Circuit erred in its statutory interpretations and assessments.

> (d) [T]he specific focus and overall context of the Massachusetts statute implicitly circumscribe the category 2 search procedure within narrow bounds. A police officer is permitted to enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person pursuant to a duly issued pink paper, but may not engage in a generalized search.

(A. A at 19a).

(2) Petitioner Does Not Question the Historical Facts.

McCabe does not dispute that it was pursuant to this statutory scheme that Dr. Yakov Barden, a licensed psychiatrist qualified under § 12(a), issued the pink paper order for the emergency hospitalization of Ms. Zinger. (A. A at 4a). The pink paper (1) expressly referenced its statutory authority, § 12, (2) provided a definition of "likelihood of serious harm" taken verbatim from § 1 of ch. 123 (A. D at 66a) (A. A at 16a), and (3) included Dr. Barden's expert opinion that Ms. Zinger "requires hospitalization to avoid the likelihood of serious harm by reason of mental illness." *Id.* The pink paper prominently contained Dr. Barden's description of Ms. Zinger as *presently* dangerous:

> [Patient] has a [history] of mental illness and she was hospitalized at Danvers [State] Hospital couple of years ago. [Patient] is very angry and hostile; she is very impulsive and explosive. She made threats to harm her ex-husband. [Patient] is dangerous to others.

(A. D at 64a) (A. A at 17a-18a).[5]

[5] In a further indication of Ms. Zinger's dangerousness, Dr. Barden prescribed: "May restrain PRN [as necessary]". (A. D at 65a).

The First Circuit found as undisputed background facts that "Ms. Zinger, a 64-year-old Lynn, Massachusetts resident with a history of mental illness and psychiatric hospitalization, as well as severe obesity and high blood pressure, resisted all attempts at communication and intervention by family members. She refused to be examined by a doctor after threatening her former husband with physical harm and upsetting her downstairs neighbors by causing loud and violent disturbances in her apartment." (A. A at 3a). McCabe does not dispute, nor did she below, that Ms. Zinger was a recalcitrant and dangerous mentally ill person, who was, as described in the pink paper, "very angry and hostile" and "very impulsive and explosive."

In short, McCabe does not dispute the statutory scheme as interpreted, that there was State procedural compliance, that Ms. Zinger was in fact a proper subject for emergency commitment under § 12(a), or that the pink paper on its face sufficiently showed Ms. Zinger was mentally ill and imminently dangerous.[6]

(3) Petition's Claim.

McCabe claims, that irrespective of the above factors, the Fourth Amendment required a judicial warrant — that the First Circuit "creat[ed] a new and unprecedented exception" allowing

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[6] Certainly Ms. Zinger had more than her share of tragedy. There is no question that the injuries and death of Ms. Zinger were tragic and regretted by all parties in this matter. Ms. Zinger was a Holocaust survivor. (A. A at 3a) (Pet. Cert. at 2). The district court stated, as the first sentence of its Memorandum and Decision granting McCabe summary judgment:

> This case involves Rose Zinger who survived the Holocaust only to die at the hands of the Lynn Police.

(A. B at 38a). With due respect to this Court, and to the district court, this memorial appears at least inappropriate in juxtaposing the officers of the Lynn Police Department, and any policy to render aid, with the Nazis of World War II Germany.

forcible warrantless entry into the home of a law-abiding citizen. (*See* Question Presented, Pet. Cert. at *i*).[7] Her position is that a warrant was required absent that type of "exigent circumstance" that turns on the executing officers' *ad hoc*, on-the-scene, personal assessment of emergency. (A. A at 13a). Her position is that despite a holistic administrative procedure that reasonably ensures accurate identification of "imminently 'dangerous' mentally ill persons in emergent circumstances" (A. A at 19a, *see infra* at p.4), the State may not allow its officers to rely on an expert psychiatric certification of the present existence of a medical-psychiatric emergency. The officers must delay through judicial proceedings while the danger threatens.

## REASONS FOR NOT GRANTING THE WRIT

### I. The Decision Below Is a Proper Application of the "Special Needs" Exception to the Warrant Requirement of the Fourth Amendment.

Rather than creating a new exception, as McCabe contends (Question Presented, Pet. Cert. at *i*), the First Circuit recognized an application of the established " 'special need' exception to the warrant requirement in the particular setting presented in this case." (A. A at 31a). This Court has repeatedly instructed, as most recently in *Vernonia School District* v. *Acton*, ___ U.S. ___, 115 S.Ct. 2386 (1995):

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[7] Of course the First Circuit did not create a new exception to the warrant requirement. A "special needs" exception to the warrant requirement has long been identified by this Court. (*See* Reason I above for Not Granting the Writ).

It appears that McCabe raises a second issue. In the body of her petition she says that the First Circuit "rejected any need for a showing of probable cause." (Pet. Cert. at 10). Assuming, without conceding, that the Question Presented contains this issue (Sup. Ct. R. 14(a)), the City responds, *infra*, *see* Reasons II (p. 13) and III (p. 15) for Not Granting the Writ.

> As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." . . . [W]hether a particular search meets the reasonableness standard " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when *special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

*Id.* at 2390-91 (citations omitted) (emphasis added).

The First Circuit followed this guidance precisely, and carefully balanced the individual and governmental interest at stake. The First Circuit found the State interests in "prompt detention of recalcitrant and 'dangerous' mentally ill persons who require immediate temporary commitment" (A. A at 15a) to be compelling and urgent, and that delay could be critical.[8]

[8] The court stated (A. A at 14a):

> The potential consequences attending a delayed commitment — both to the mentally ill subject and others — may be extremely serious, sometimes including death or bodily injury. Thus, we think it is especially significant to the present analysis that warrantless 'special need' searches have been condoned by the courts in circumstances where the State interests were far less compelling and urgent.

In balance, the court found that a "universal warrant requirement [in this context is] 'undue' and 'unreasonable' when viewed in relation to the minimal additional protection afforded by a requirement that a pink paper be screened by a magistrate before it is executed." (A. A at 22a).[9] Perhaps the essence of the First Circuit's ruling is stated in the court's following language:

> Compliance with a warrant requirement in the context of these temporary, involuntary commitments for medical-psychiatric examination would entail critical delays in safeguarding the mentally ill person, and others, without affording commensurate privacy protections to the subject. Category 2 searches foster important governmental interests largely because the inherent imprecision in predicting the timing of any outbreak of "dangerousness" on the part of the recalcitrant, mentally ill person, inevitably means that the time spent securing judicial approval of a pink paper represents a potentially dangerous delay of *incalculable* proportion.

(A. A at 20a) (emphasis in original) (citation omitted).

McCabe claims that the First Circuit violated *Payton* v. *New York*, 445 U.S. 573 (1980), through "unjustified deviation" from precedents of this Court. (Pet. Cert. at 9).[10] McCabe's

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[9] The First Circuit was properly concerned, as in this context of need for prompt response to medical-psychiatric emergency, that "rigid adherence to a warrant requirement reaches its most suspect extreme where a judicial officer lacks the innate expertise to assess the soundness of the basic ground upon which the warrant request is predicated." (A. A at 22a-23a).

[10] McCabe says the following cases are inconsistent with the First Circuit's holding: *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987) (probation officer's warrantless search of probationer's home not violative of Fourth Amendment); *O'Connor* v. *Ortega*, 480 U.S. 709 (1987) (warrantless search of government employee's work space not violative of Fourth Amendment); *New Jersey* v. *T.L.O.*, 469 U.S. 325

claim is unfounded. Her argument is narrowly fact-specific, failing to recognize the broader underlying concepts of the case law: *i.e.*, reasonableness as the "ultimate" command of the Fourth Amendment, *Camara, infra* n.10, at 539, *see Soldal* v. *Cook County, Ill.*, 506 U.S. 56, 71 (1992); "What is reasonable depends on the context within which a search takes place." *T.L.O, infra* n.10, at 337; "careful balancing of governmental and private interest," *T.L.O* at 341; and, common sense and practicality as dictating a need for "special needs."

Additionally, McCabe overstates. For example, McCabe says that *Wyman* v. *James, infra* n.10, is inapposite because this Court reasoned in *Wyman* that if consent to a welfare visit is withheld, "there is no entry of the home and there is no search." (Pet. Cert. at 9, quoting *Wyman* at 317). But McCabe fails to note that this Court went on to say:

> If, however, we were to assume that a caseworker's home visit . . . [because consent is coerced and the interview is searching] does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard. . . . [T]he specific content and incidents of this right must be shaped by the context in which it is asserted.

*Wyman, supra* at 318 (citations and internal quotes omitted).

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(1985) (warrantless in-school search of students' personal property not violative of Fourth Amendment); *Wyman* v. *James*, 400 U.S. 309 (1971) (social worker's warrantless visit to welfare recipient's home not violative of Fourth Amendment); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) (warrantless housing inspection violative of Fourth Amendment). (Pet. Cert. at 9-10).

In yet a further overstatement, McCabe says categorically: "in the context of administrative searches this case is squarely governed by the *Camara* case, which expressly held that a warrant is required to compel entry to the home." (Pet. Cert. at 10). But McCabe fails to note the criminal context of *Camara*. In addition, McCabe fails to note that in *Wyman* this Court distinguished *Camara* on that very basis. "[*Camara* is] not inconsistent with our result here. . . . [T]he facts . . . are significantly different from those before us." *Wyman* at 324-25. The Court specifically noted that the welfare recipient in *Wyman* was not subject to criminal prosecution for refusal to allow the home visit, *id.* at 323, whereas *Camara* "arose in a criminal context where a genuine search was denied and prosecution followed." *Wyman* at 325. The context of the instant case is in no way criminal, a fact duly noted and considered by the First Circuit. (A. A at 27a). Accordingly, *Camara* is not the categorical authority that McCabe represents.

In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court held that a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest was violative of the Fourth Amendment. It is true, as McCabe quotes, that in *Payton* the Court stated, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590. But McCabe relies on *Payton* to draw an absolute line which McCabe says the First Circuit crossed. (Pet. Cert. at 5). This Court has cautioned against mechanical applications of the Fourth Amendment.[11]

> [This Cour[t] [has a] long established recognition that standards of reasonableness under the Fourth

[11] "[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (quotation and citation omitted).

> Amendment are not susceptible of Procrustean application; [e]ach case is to be decided on its own facts and circumstances; the limitations imposed by the Fourth Amendment . . . have to be developed in the concrete factual circumstances of individual cases.

*Ornelas* v. *United States*, ___ U.S. ___, 116 S.Ct. 1657, 1661 (1996) (citations and internal quotation marks omitted).

It is critical to observe that *Payton* specifically involved criminal wrongdoing, with criminal consequences to the results of the search:

> Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant. . . . But a warrant is not required to establish the reasonableness of all governmental searches [as in] special needs beyond the normal need for law enforcement. . . .

*Vernonia School District*, *supra* at 115 S.Ct. 2390-91. Additionally, there was no special need in *Payton*.[12] Clearly, as the First Circuit concluded, this case presents such a special need.[13]

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[12] Unlike the instant case, where the need for detention of recalcitrant and dangerous mentally ill persons in emergent circumstances renders the warrant requirement impractical, the issue of "the practical consequences of a warrant requirement" in *Payton* at 602, was viewed "with skepticism." *Id.*

[13] The First Circuit was particularly careful to set the bounds of its ruling, cautioning in its Conclusion that the "special need" balancing procedure is "designedly fact-specific and must be calibrated anew in assessing the reasonableness of each administrative search to which it is applied." (A. A at 31a). "We hold only that law enforcement officers in possession of a pink paper, duly issued pursuant to category 2, Mass. Gen. Laws Ann. ch. 123, § 12(a), may effect a warrantless entry of the subject's residence within a reasonable time after the pink paper issues." (A. A at 32a).

## II. This Case Does Not Present In a Form Appropriate for Certiorari Review the Question of Whether a Commitment Order May Be Issued Without Probable Cause, Because: (A) The Petitioner Did Not Dispute Below That the Commitment Order Was Issued Upon Probable Cause; (B) The Court Below Did Not Rule That Probable Cause Was Unnecessary; and, In Any Event, (C) It Appears That the Court Below Was of the View That Probable Cause Is Satisfied By the Factual Circumstances of This Case.

### A. *The Petitioner Did Not Dispute Below That The Commitment Order Was Issued Upon Probable Cause.*

McCabe says here that the holding below is in conflict with circuit decisions holding "that an order authorizing the seizure of a person in the context of civil commitment proceedings must be based on probable cause." (Pet. Cert. at 11). But below McCabe never disputed that the pink paper on its face satisfied both the procedural and substantive provisions of Mass. Gen. Laws Ann. ch. 123, §§ 1 and 12(a). McCabe did not dispute that the pink paper sufficiently demonstrated that Ms. Zinger "by reason of mental illness" was "dangerous."[14] Rather, McCabe argued that the City's policy of forced entries to effectuate civil commitment papers "*per se* is illegal and in

[14] McCabe had stated in her complaint that "Rose Zinger suffered from mental illness," and that Ms. Zinger's daughter "had asked mental health workers . . . to assess her mother's mental condition." (App. 1st Cir., Volume 1, p.12). Additionally, the pink paper was based "on the *reports of family members* and neighbors as to Ms. Zinger's physical and behavioral symptoms." (A. A at 4a) (emphasis added). Although in her original complaint McCabe claimed negligence against Dr. Barden, that claim was settled (A. A at 5a, n.3), and in this action against the City there was no claim that the pink paper was inadequate. In this amended complaint against the City, McCabe merely alleged, as a matter of fact, that Dr. Barden issued the pink paper. (App. 1st Cir., Volume 3, p.186, ¶ 14).

violation of the Fourth Amendment" because of the lack of a warrant. (App. 1st Cir., Volume 3, p.158).[15]

### B. *The Court Below Did Not Rule That a Commitment Order May Issue Without Probable Cause.*

It appears that in an attempt to seize an issue, McCabe says that the First Circuit "rejected any need for a showing of probable cause before such orders are issued." (Pet. Cert. at 10). The First Circuit did no such thing. Indeed, the First Circuit did not specifically decide the issue. The footnote language of the court upon which McCabe relies for rejection, that "[i]t is largely irrelevant whether the 'likelihood of serious harm' criterion of Mass. Gen. Laws Ann. ch. 123, § 12(a) approximates the 'probable cause' inquiry appropriate in the search warrant context" (Pet. Cert. at 10-11, quoting A. A at 24a, n.11) is hardly a decision that it does not.[16]

### C. *It Appears That the Court Below Was of the View That Probable Cause, if Required, Was Satisfied.*

Moreover, the opinion of the First Circuit demonstrates that the court was satisfied to a rather high level of certainty that the

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[15] Reflecting this argument, during the hearings on summary judgment the district court viewed the pink paper as satisfying probable cause, but believed a warrant was required:

> [T]here are two prongs to the Fourth Amendment. One is the probable cause prong and the other is the warrant prong. That [§ 12(a)] provides probable cause. It is not clear to me that that requires the dispensing of a warrant, dispensing of the warrant.

(App. 1st Cir., Volume 3, p.157). The probable cause argument that McCabe did make was that the pink paper could not serve as probable cause for an "exigent circumstances" search without a warrant because the officers "had ample time to obtain a search warrant." (A. A at 13a).

[16] It is interesting to note that language virtually identical to the Massachusetts provision of "likelihood of serious harm" and its definition in Mass. Gen. Laws ch. 123, § 1 have been held to satisfy probable cause by the very cases upon which McCabe relies for her argument that this decision is in conflict with other circuits. (*See infra* Reason III for Not Granting the Writ, commencing at p.15).

State procedures ensured, and the pink paper itself evinced, that Ms. Zinger was both mentally ill and imminently dangerous, *e.g.*:

> the procedures are reasonably designed to *ensure accurate* identification and prompt detention of recalcitrant and "dangerous" mentally ill persons who require immediate temporary commitment

(A. A at 15a) (emphasis added);

> We think that Mass. Gen. Laws ch. 123, § 12(a), in general, and the commitment order issued by Dr. Barden, in particular, were appropriately suited to these legitimate purposes.

*Id.* It appears that the court was of the view that probable cause, if required, was satisfied. And as the historical facts were not disputed (*see infra* at p.5), clearly probable cause was satisfied.

With no dispute below, and no clear ruling, a serious question of the appropriateness of this case for certiorari review of the requirement of probable cause for this "special need" search is presented. Certainly, the issue is not posed in the "clear and unequivocal manner which is so necessary for proper adjudication in this Court." *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 675 (1969).

## III. In Any Event, the Decision Below Does Not Conflict Substantively With Decisions of Other Circuits Respecting Probable Cause In the Context of Civil Commitment Seizures.

The decision below does not conflict substantively with any requirement of other circuits respecting probable cause for

seizure of mentally ill and dangerous persons.[17] The cases relied upon by the petitioner as presenting a conflict with this decision, while invoking the phrase "probable cause" recognize that reasonableness is its premise. They apply no higher standard of reasonableness than does the instant decision, and look contextually to identical underlying substantive requirements: the concomitant requirements of mental illness and dangerousness. They follow seriatim:

In *Pino* v. *Higgs*, 75 F.3d 1461 (10th Cir. 1966) the court determined that police officers "acted reasonably under the circumstances and in accordance with New Mexico's involuntary commitment statute," *id.* at 1468, that

> they had "reasonable grounds to believe that the person, as a result of mental illness, presents a serious likelihood of harm to [her]self or others and that immediate detention is necessary to prevent harm."

*Id.* (quoting statute).

In *Glass* v. *Mayas*, 984 F.2d 55 (2d Cir. 1993) the court said:

> [t]he Fourth Amendment requires that an involuntary hospitalization "may be made only upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard."

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[17] Probable cause is not some singularly fixed abstraction. It is a concept of many applications, and contextually fact-specific. Very recently, this Court spoke of "probable cause" (and "reasonable suspicion"):

> Articulating precisely what [they] mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent ment, not legal technicians, act. . . . We have cautioned that these two legal principles are not finely tuned standards. . . . They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."

*Ornelas* v. *United States*, *supra* 116 S.Ct. at 1661 (citations and internal quotes omitted).

*Id.* at 58 (quoting *Villanova* v. *Abrams*, 972 F.2d 792, 795 (7th Cir. 1992)). In *Villanova, supra*, the court stated that the governing legal standard was provided by the Illinois mental health code:

> a person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future. . . .

*Id.* at 794 (quoting code).

In *Gooden* v. *Howard County, Md.*, 954 F.2d 960 (4th Cir. 1992) the court stated that probable cause is to be judged "in the mental health seizure context." *Id.* at 968. And in both *Maag* v. *Wessler*, 960 F.2d 773 (9th Cir. 1991) and *Harris* v. *Pirch*, 677 F.2d 681 (8th Cir. 1982), the contexts speak of

> appears to be seriously mentally ill and . . . a danger to others or to himself"

*Maag* at 776 (quoting code), and

> reasonable cause to believe that such person is suffering from a mental disorder and presents a likelihood of serious physical harm to himself or others which is imminent. . . .

*Harris* at 684 (quoting code).

None of these statutory standards, nor the "reasonableness" applied, constitute any conflict with the Massachusetts statute as interpreted and applied by the First Circuit.

Finally, in a case that appears more supportive of the City than of the Petitioner, the court in *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971) recognized that a showing of probable

cause for involuntary commitment may be made on a physician's certifying document "alone," where, as in the instant case, there is "no dispute about the factual recitals and diagnoses therein." *Id.* at 1374.[18]

Accordingly, it does not appear that a substantial conflict, or indeed any conflict exists. Certainly, there is not "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" as to warrant certiorari review. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) *quoted in Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955).

## IV. To the Extent That This Case Presents a Novel Issue, It Would Be An Appropriate Exercise of This Court's Discretion to Deny Certiorari Review In Order to Permit State and Federal Courts to Address the Issue.

McCabe says that this case presents an important and novel issue. (Pet. Cert. at 6-7).[19] While there may be debate as to how "novel" this case is in the realm of "special needs" searches, to the extent that it is novel[20] and important, as Justice Stevens has said:

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[18] The City relied on several of these same cases in its brief before the First Circuit. (City's Br. 1st Cir. at 19). And, the First Circuit "consult[ed] their reasoning for guidance" in this case. (A. A at 12a).

[19] Petitioner says that "[t]he issue presented in this case is at least as important as that in *Soldal* [v. *Cook*, 506 U.S. 56 (1992)]." (Pet. Cert. at 12). Thus, the Petitioner says, this court should grant certiorari review. The City declines to engage in debate, perhaps presumptuous, of the relative importance of cases that come before this Court on certiorari. The City respectfully views that these judgments of relative importance are exclusively for this Court in the exercise of certiorari discretion.

[20] The First Circuit allowed that the area is as yet "uncharted" as respects "searches" to effect involuntary commitments. (A. A at 12a).

> those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts.[21]
>
> Often, a denial of certiorari on a novel issue will permit the state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court."[22]

*Payton* itself appears to be a model of such postponement. This Court had repeatedly reserved the issue in *Payton*. *Payton* at 574-75. By the time this Court granted certiorari review in *Payton*, a large number of state and federal courts had addressed the issue. *Id.* at p.575, notes 1-4.

## V. This Case Is Not Appropriate for Certiorari Review As the Judgment Is Supportable On An Alternative Ground.

This Court refuses to grant a writ of certiorari where there is an alternative ground for finding that the judgment below is correct.[23] There is such a ground here.

The City fully briefed and argued below the alternative ground that its policy was to execute pink papers pursuant to Mass. Gen. Laws Ann. ch. 123, §§ 1 & 12(a), and that § 12(a) specifically provides for issuance of pink papers in an "emergency." Thus, the City argued, its policy was within the estab-

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[21] *Lackey* v. *Texas*, ___ U.S. ___, 115 S.Ct. 1421 (1995) (Mem.) (Stevens, J., respecting denial of certiorari).

[22] *Id.* 115 S.Ct. at 1422, quoting *McCray* v. *New York*, 461 U.S. 961 (1983) (Mem.) (Stevens, J., with Blackmun, J. and Powell, J., joining).

[23] *See, e.g., Colorado* v. *Nunez*, 465 U.S. 324 (1984). The "precedents [of this Court] establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 814, n.12 (1984).

lished "Law of Emergency." (City's Br. 1st Cir. at 18-23).[24] (A. A at 12a).

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), this Court specifically recognized an exception to the warrant requirement in emergency situations:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or an emergency."

*Id.* at 393 (quoting *Wayne* v. *United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)) (Berger, C.J.) (citations omitted).[25]

The First Circuit noted McCabe contended that "medical-psychiatric 'emergency' determinations do not equate with constitutionally cognizable "exigent circumstances. . . ." (A. A at 13a). The First Circuit decided that it need not decide

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[24] The City also argued that if the time of execution of the pink paper by the officers was "somehow beyond the pale of emergency, the execution would not be an act of the 'policy'. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978)." (City's Br. 1st Cir. at 17) (*See* A. A at 13a, n.8).

[25] Former Chief Justice Warren Berger also wrote in *Wayne*, *supra*:

> Neither the Constitution, statutes or judicial decisions have made the home inviolable in an absolute sense. Collectively they have surrounded the home with great protection but protection which is qualified by the needs of ordered liberty in a civilized society.
>
> Breaking into a home by force is not illegal if it is reasonable in the circumstances. . . .
>
> That such an entry would be an intrusion is undoubted but here we reach the balancing of interests and needs.

whether they do, deciding the case on the "special needs" ground.[26]

The City respectfully maintains that the "law of emergency" alternatively supports this judgment.

## CONCLUSION

For all the above reasons, the writ of certiorari should be denied.

Respectfully submitted,

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[26] "[W]e need not enter the skirmish over the distinctions between 'emergencies' and 'exigent circumstances' [because] [t]he City policy, as evidenced by the actual conduct of its police officers, falls squarely within a recognized class of *systemic* 'special need' searches which are conducted without warrants in furtherance of important administrative purposes." (A. A at 13a) (emphasis in original).